

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS

In the Matter of the Proposed New Rules  
Governing Certification of Integrated Dual  
Diagnosis Treatment, *Minnesota Rules* Parts  
9533.0010 to 9533.0180

**REPORT OF THE  
ADMINISTRATIVE LAW JUDGE**

This matter came before Administrative Law Judge James E. LaFave for a rulemaking hearing on April 3, 2013. The public hearing was held in Rooms 2370 and 2380 in the Elmer L. Anderson Human Services Building, 540 Cedar Street, St. Paul, MN 55155.

The Minnesota Department of Human Services (DHS or Agency) proposes the adoption of a new rule to certify integrated dual diagnosis treatment (IDDT) programs that incorporate certain evidence-based practices.<sup>1</sup>

The hearing and this Report are part of a larger rulemaking process under the Minnesota Administrative Procedure Act.<sup>2</sup> The Minnesota Legislature has designed this process so as to ensure that state agencies have met all of the requirements that the state has specified for adopting rules.

The hearing was conducted so as to permit agency representatives and the Administrative Law Judge to hear public comment regarding the impact of the proposed rules and what changes might be appropriate. Further, the hearing process provides the general public an opportunity to review, discuss and critique the proposed rules.

The agency must establish that the proposed rules are necessary and reasonable; that the rules are within the agency's statutory authority; and that any modifications that the agency may have made after the proposed rules were initially published in the *State Register* are within the scope of the matter that was originally announced.<sup>3</sup>

The agency panel at the public hearing included Beth Scheffer (Appeals and Regulations Division), Cynthia Godin (Adult Mental Health Division), Julie Pearson (Adult Mental Health Division), Glenace Edwall (Director, Children's Mental Health Division), Christopher Randolph (Children's Mental Health Division), Kevin Evenson

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<sup>1</sup> Ex. 3 at 1 (Statement of Need and Reasonableness – SONAR).

<sup>2</sup> See, Minn. Stat. §§ 14.131 through 14.20.

<sup>3</sup> Minn. Stat. §§ 14.05, 14.131, 14.23 and 14.25.

(Director, Alcohol and Drug Addiction Division), Kathy Mastrom (Alcohol and Drug Addiction Division), and Julie Reger (Licensing Division).<sup>4</sup>

Approximately thirty-nine people attended the hearing and signed the hearing register. The proceedings continued until all interested persons, groups or associations had an opportunity to be heard concerning the proposed rules. Six members of the public made statements or asked questions during the hearing.<sup>5</sup>

After the close of the hearing, the Administrative Law Judge kept the rulemaking record open for another 20 calendar days – until April 23, 2013 – to permit interested persons and the DHS to submit written comments. Following the initial comment period, the hearing record was open an additional five business days so as to permit interested parties and the DHS an opportunity to reply to earlier-submitted comments.<sup>6</sup> The hearing record closed on April 30, 2013.

On May 24, 2013, the Chief Administrative Law Judge granted an extension of the time to complete this report until Tuesday, June 4, 2013.<sup>7</sup>

## **SUMMARY OF CONCLUSIONS**

The Agency has established that it has the statutory authority to adopt the proposed rules and that the proposed rules are needed and reasonable.

Based upon all the testimony, exhibits, and written comments the Administrative Law Judge makes the following:

## **FINDINGS OF FACT**

### **I. Background to the Proposed Rules**

1. It has been estimated that co-occurring substance use disorders and mental illness affect somewhere between 5 and 15 million Americans. In Minnesota, nearly one out of five individuals receiving chemical dependency treatment has a mental illness; and almost 40 percent of persons served in the mental health system have a substance-related disorder.<sup>8</sup>

2. Individuals with co-occurring disorders are a group that tends to use the most expensive, crisis-oriented health care services. Among the group of Americans who use over 70 percent of the nation's health care resources, persons with co-

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<sup>4</sup> Testimony (Test.) of Elizabeth Scheffer.

<sup>5</sup> See, Test. of Karen Edens, Test. of Bonnie Freeland, Test. of Suzanne O'Brien, Test. of Paula DeSanta, Test. of John Henderlite, and Test. of Ron Brand.

<sup>6</sup> See, Minn. Stat. § 14.15, subd. 1.

<sup>7</sup> Minn. Stat. § 14.15, subd. 2.

<sup>8</sup> Ex. 3 at 1. (SONAR).

occurring disorders comprise the majority. Currently treatment outcomes are poor for these individuals.<sup>9</sup>

3. Research has demonstrated that people with co-occurring disorders experience improved outcomes when they receive a holistic, specialized form of treatment known as “integrated treatment.”<sup>10</sup>

4. In an integrated treatment model, the contributions from professionals from both the mental health and substance abuse fields are merged into a single treatment regimen and setting. Integrated treatment services are provided according to treatment protocol based on research.<sup>11</sup>

5. The DHS proposes the adoption of a new rule to certify IDDT programs that incorporate these evidence-based practices.<sup>12</sup>

## **II. Rulemaking Authority**

6. The DHS cites Minn. Stat. § 245.4863, as its source of statutory authority for these proposed rules. This statute grants the Agency authority to “adopt rules as necessary to implement this section.” The statute further provides:

The commissioner shall ensure that the rules are effective on July 1, 2013, thereby establishing a certification process for integrated dual disorder treatment providers and a system through which individuals receive integrated dual diagnosis treatment if assessed as having both a substance use disorder and either a serious mental illness or emotional disturbance.<sup>13</sup>

## **III. Procedural Requirements of Chapter 14**

### **A. Publications**

7. On August 29, 2011, the Agency published in the *State Register* a Request for Comments seeking comments on “new rules that will govern the delivery of mental health and chemical health services, specifically integrated dual diagnosis treatment.”<sup>14</sup>

8. On November 30, 2012, the Agency requested review and approval of its additional notice plan.

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<sup>9</sup> Ex. 3 at 1 and 2. (SONAR).

<sup>10</sup> Ex. 3 at 1. (SONAR).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> Minn. Stat. § 245.4863.

<sup>14</sup> 36 *State Register* 194 (August 29, 2011).

9. Administrative Law Judge James E. LaFave issued an Order on December 7, 2012, approving the Additional Notice Plan and Hearing Notice.

10. The Notice of Hearing was signed and dated December 7, 2012, and published in the *State Register* on December 24, 2012.<sup>15</sup>

11. The DHS, on December 20, 2012, mailed the Notice of Hearing and proposed rules to all persons and associations who, on the rulemaking mailing list established by Minn. Stat. § 14.14, subd. 1a, indicated that they preferred receiving notices via U.S. mail.<sup>16</sup>

12. The DHS, on December 20, 2012, sent via electronic mail the Notice of Hearing and proposed rules to all persons and associations who, on the rulemaking mailing list established by Minn. Stat. § 14.14, subd. 1a, indicated that they preferred receiving notices via electronic mail.<sup>17</sup>

13. On December 20, 2013, the DHS mailed the Notice of Hearing, according to the Additional Notice Plan approved by the Office of Administrative Hearings, to all persons and associations on the additional notice list, except for providers certified as an Assertive Community treatment program or an Adult Rehabilitative Mental Health Services program. These two sets of providers received notice in a separate mailing on the same date.<sup>18</sup>

14. On December 20, 2013, the DHS mailed a copy of the Notice of Hearing and the SONAR to certain legislators and the Legislative Coordinating Commission. The legislators notified included the chief house and senate authors of the authorizing legislation as required by Minn. Stat. § 14.116.<sup>19</sup>

15. On December 13, 2012, when the SONAR became available to the public, the Department submitted an electronic copy of the SONAR to the Legislative Reference Library via e-mail to [sonars@lrl.leg.mn](mailto:sonars@lrl.leg.mn) to meet the requirement set forth in Minn. Stat. §§ 14.131 and 14.23.<sup>20</sup>

16. The Notice of Hearing identified the date and location of the hearing in this matter.<sup>21</sup>

17. At the hearing on April 3, 2013, the Agency filed copies of the following documents as required by Minn. R. 1400.2220:

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<sup>15</sup> Ex. 4, Ex. 5; See, 37 *State Register* 973 (December 24, 2012).

<sup>16</sup> Ex. 6.

<sup>17</sup> *Id.*

<sup>18</sup> Ex. 7.

<sup>19</sup> May 23, 2013, supplemental filing, received into the record as "Ex. 9."

<sup>20</sup> Ex. 4.

<sup>21</sup> Ex. 5.

- a. the DHS's Request for Comments as published in the *State Register* on August 29, 2011;<sup>22</sup>
- b. the proposed rules dated November 29, 2012, including the Revisor's approval;<sup>23</sup>
- c. the DHS's Statement of Need and Reasonableness (SONAR);<sup>24</sup>
- d. the Certificate of Mailing the SONAR to the Legislative Reference Library on December 18, 2012;<sup>25</sup>
- e. the Notice of Hearing as mailed, signed and dated on December 7, 2012 and as published in the *State Register* on December 24, 2012;<sup>26</sup>
- f. the Certificate of Mailing the Notice of Hearing to the rulemaking mailing list on December 20, 2012, and the Certificate of Accuracy of the Mailing List;<sup>27</sup>
- g. the Certificates of Mailing to the Additional Notice List for the Notice of Hearing;<sup>28</sup>
- h. the written comments on the proposed rules that were received by the DHS;<sup>29</sup> and
- i. the Certificate of Sending the Notice and the Statement of Need and Reasonableness to Legislators and the Legislative Coordinating Commission on December 20, 2012.<sup>30</sup>

## **B. Additional Notice Requirements**

18. Minn. Stat. §§ 14.131 and 14.23 requires that an agency include in its SONAR a description of its efforts to provide additional notification to persons or classes of persons who may be affected by the proposed rule; or alternatively, the agency must detail why these notification efforts were not made.

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<sup>22</sup> Ex. 1.

<sup>23</sup> Ex. 2.

<sup>24</sup> Ex. 3.

<sup>25</sup> Ex. 4.

<sup>26</sup> Ex. 5.

<sup>27</sup> Ex. 6.

<sup>28</sup> Ex. 7.

<sup>29</sup> Ex. 8.

<sup>30</sup> Ex. 9.

19. On December 20, 2012, the DHS provided the Notice of Hearing, according to the Additional Notice Plan approved by the Office of Administrative Hearings:

By mailing or e-mailing notice to:

- Minnesota Medical Association;
- Minnesota Psychological Association;
- Minnesota Psychiatric Association;
- Minnesota Association of County Social Service Administrators;
- County Board Chairs;
- Minnesota Association of Community Mental Health Programs;
- Minnesota Association of Residential Treatment Facilities;
- National Alliance on Mental Illness, Minnesota (NAMI-MN)
- Pacer Center;
- Mental Health Consumer/Survivor Network of Minnesota;
- Mental Health Association of Minnesota;
- Minnesota Joint Council of Health Plans;
- Association of Children's Mental Health;
- Minnesota Council of Child Caring Agencies;
- Minnesota Association of Resources for Recovery and Chemical Health;
- Advocates for persons with dual disorders;
- Minnesota Hospital Association; and
- Providers eligible for certification under the proposed rule, including:
  - o Mental health centers and clinics approved under Minnesota rule part 9520.0750, et seq.;
  - o Residential and non-residential chemical dependency treatment providers licensed under Minnesota Rules chapter 9530;
  - o Assertive community treatment providers certified under Minnesota Statutes section 256B.0623;
  - o Adult rehabilitative mental health services providers certified under Minnesota Statutes section 256B.0623;
  - o Adult intensive rehabilitative services providers certified under Minnesota Statutes section 256.0622;
  - o Children's' residential services providers licensed under Minnesota Rules chapter 2960, in which the license includes providing either mental health or chemical dependency treatment services; and
  - o Tribal social services contacts.<sup>31</sup>

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<sup>31</sup> Ex. 7.

## **C. Notice Practice**

### **1. Notice to Stakeholders**

20. On December 20, 2012, the DHS provided a copy of the Notice of Hearing to its official rulemaking list (maintained under Minn. Stat. § 14.14), and to stakeholders identified in its additional notice plan.<sup>32</sup>

21. The hearing on the proposed rules was held on April 3, 2013.<sup>33</sup>

22. There are 104 days between December 20, 2012 and April 3, 2013.

23. The Administrative Law Judge concludes that the DHS fulfilled its responsibility to mail the Notice of Hearing "at least 33 days before the ... start of the hearing."

### **2. Notice to Legislators**

24. On December 20, 2012, the DHS sent a copy of the Notice of Hearing and the Statement of Need and Reasonableness to Legislators and the Legislative Coordinating Commission as required by Minn. Stat. § 14.116.<sup>34</sup>

25. Minn. Stat. § 14.116 requires the agency to send a copy of the Notice of Hearing and the SONAR to certain legislators on the same date that it mails its Notice of Hearing to persons on its rulemaking list and pursuant to its additional notice plan.

26. The Administrative Law Judge concludes that the DHS did fulfill its responsibilities to mail the Notice of Hearing "at least 33 days before the . . . start of the hearing."

### **3. Notice to the Legislative Reference Library**

27. On December 18, 2012, the DHS mailed a copy of the SONAR to the Legislative Reference Library.<sup>35</sup>

28. Minn. Stat. § 14.23 requires the agency to send a copy of the SONAR to the Legislative Reference Library when the Notice of Intent to Adopt is mailed.

29. The Administrative Law Judge concludes that the DHS did fulfill its responsibilities to mail the Dual Notice "at least 33 days before the end of the comment period . . . ."

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<sup>32</sup> Ex. 6 and Ex. 7.

<sup>33</sup> See, Ex. 5.

<sup>34</sup> Ex. 9.

<sup>35</sup> Ex. 4.

#### **4. Assessment of the Agency's Notice Practice**

30. Minn. Stat. § 14.15, subd. 5 requires an administrative law judge to disregard an error or defect in the proceeding due to an “agency’s failure to satisfy any procedural requirement” if the administrative law judge finds “that the failure did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process . . . .”

31. The agency must place into the hearing record “any other document or evidence to show compliance with any other law or rule which the agency is required to follow in adopting this rule.”<sup>36</sup>

32. The DHS did not file at the hearing or during the comment and rebuttal period, any document or evidence to show it complied with its obligation to give notice to the legislature,<sup>37</sup> or that it consulted with the Commissioner of Management and Budget to evaluate the fiscal impact and fiscal benefits of the proposed rule on units of local government.<sup>38</sup>

33. On May 23, 2013, DHS made a supplemental filing of the Certificate of Sending Notice and the Statement of Need and Reasonableness to Legislators and the Legislative Coordinating Commission.<sup>39</sup> The notice to the legislators was made on December 20, 2012.<sup>40</sup>

34. On May 28, 2013, the DHS made another supplemental filing when it presented the January 28, 2013, letter on behalf of the Commissioner of Management and Budget which concluded “given the voluntary nature of the rule, I do not believe that the proposed rule will have a significant fiscal impact on local units of government.”<sup>41</sup>

35. Supplemental filings Exs. 9 and 10 document that the DHS timely provided notice to the legislature and consulted with Management and Budget as required by law.

36. The Administrative Law Judge concludes that the DHS’s late supplemental filings did not deprive any person or entity of an opportunity to participate meaningfully in the rulemaking process. For those reasons, these procedural errors were harmless errors under Minn. Stat. § 14.15, subd. 5 (1).

#### **D. Impact on Farming Operations**

37. Minn. Stat. § 14.111 imposes additional notice requirements when the proposed rules affect farming operations. The statute requires that an agency provide a

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<sup>36</sup> Minn. R. 1400.2220, subp. 1(K).

<sup>37</sup> See, Minn. Stat. § 14.116.

<sup>38</sup> See, Minn. Stat. § 14.131; Minn. R. 1400.2310(P).

<sup>39</sup> See, Ex. 9.

<sup>40</sup> *Id.*

<sup>41</sup> May 30, 2013, supplemental filing, received into the record as “Ex. 10.”



copy of any such changes to the Commissioner of Agriculture at least 30 days prior to publishing the proposed rules in the *State Register*.

38. The proposed rules do not impose restrictions or have an impact on farming operations. The Administrative Law Judge finds that the Agency was not required to notify the Commissioner of Agriculture.

#### **E. Statutory Requirements for the SONAR**

39. The Administrative Procedure Act obliges an agency adopting rules to address eight factors in its Statement of Need and Reasonableness.<sup>42</sup> Those factors are:

- (1) a description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule;
- (2) the probable costs to the agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues;
- (3) a determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule;
- (4) a description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule;
- (5) the probable costs of complying with the proposed rule, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals;
- (6) the probable costs or consequences of not adopting the proposed rule, including those costs or consequences borne by identifiable categories of affected parties, such as separate classes of government units, businesses, or individuals; and
- (7) an assessment of any differences between the proposed rule and existing federal regulations and a specific analysis of the need for and reasonableness of each difference.

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<sup>42</sup> Minn. Stat. § 14.131.

- (8) an assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.

## **1. The Agency's Regulatory Analysis**

- (a) A description of the classes of persons who probably will be affected by the proposed rule, including classes that will bear the costs of the proposed rule and classes that will benefit from the proposed rule.**

40. The Department asserts the proposed rules will likely affect the following classes of persons:

- persons with co-occurring substance-related disorders and mental illness who seek or receive mental health treatment, or chemical dependency treatment, and their families;
- mental health clinics, chemical dependency treatment programs, and others who provide mental health or chemical dependency treatment services either directly, or through a vendor;
- providers that seek certification of an integrated dual diagnosis treatment program;
- insurance companies, health plans, self-insured entities, and persons who pay for mental health or chemical dependency services; and
- persons who pay taxes to support public services including mental health and chemical dependency care, assessment, and treatment.<sup>43</sup>

41. The primary beneficiaries of the proposed rule will be persons with co-occurring substance-related disorder and mental illness. These persons will benefit from the availability of integrated treatment that conforms to evidence-based practice that likely will result in better treatment outcomes.<sup>44</sup>

42. The DHS also believes that in the long term, persons who pay for mental health services and chemical dependency services, as well as those whose taxes support public services, will benefit from improved outcomes and containing health care costs.<sup>45</sup>

43. The costs of the proposed rules will, for the most part, be borne by providers who develop programs to meet the certification criteria. It is possible that there will be offsets to those costs as a result of improved outcomes and system efficiencies.<sup>46</sup>

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<sup>43</sup> Ex. 3 at 4 (SONAR).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

**(b) The probable costs to the Agency and to any other agency of the implementation and enforcement of the proposed rule and any anticipated effect on state revenues.**

44. The DHS's licensing division estimates that costs for implementing the proposed rules would be \$20,000 during the first year and \$6,000 per year thereafter. The DHS does not anticipate hiring new employees to implement or enforce the proposed rules. While DHS's policy divisions anticipate providing additional training to providers regarding the proposed rules, those costs could be absorbed by replacing training that otherwise would have been offered to provider new hires and as part of ongoing provider training.<sup>47</sup>

45. The DHS estimates that in the short term, payments for medical assistance will not increase due to the proposed changes. While the legislature did not appropriate funds for integrated dual diagnosis treatment, it directed the DHS to "apply for any federal waivers necessary to secure, to the extent allowed by law, federal financial participation."<sup>48</sup>

46. For the long term, DHS anticipates that improved treatment outcomes will better contain health care costs for the population being served. To support this claim they cite several examples. In the State of Ohio, data analysis of integrated dual disorders treatment outcomes shows significant cost savings. Researchers from the Center for Evidence-Based Practice at Case Western Reserve University conducted an analysis of the state's claims data and found that for the 160 people who used the greatest amount of behavioral health care services, IDDT produced a \$1.4 million reduction in total claims after one year.<sup>49</sup> Also, the proposed rule requirement to screen individuals to identify those with dual disorders is a cost effective practice.<sup>50</sup>

**(c) The determination of whether there are less costly methods or less intrusive methods for achieving the purpose of the proposed rule.**

47. The DHS proposed the least costly method for achieving the purposes of the proposed rule. The rule objectives are to establish a certification process for IDDT programs, and ensure that persons with co-occurring disorders receive IDDT. The DHS designed program standards based on evidence-based practices and proven treatment models. DHS does not know of any other less costly means for achieving the rule's purpose. In addition, the voluntary nature of the certification program makes it the least intrusive method of achieving the rule's purpose.<sup>51</sup>

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<sup>47</sup> Ex. 3 at 5 (SONAR).

<sup>48</sup> Ex. 3 at 5 (SONAR); Minn. Stat. § 245.4863(c).

<sup>49</sup> Ex. 3 at 5 (SONAR).

<sup>50</sup> *Id.*

<sup>51</sup> Ex. 3 at 6 (SONAR).

- (d) A description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.**

48. The legislature has determined that the DHS should adopt rules to govern certification of programs providing integrated services to persons with dual disorders. Rulemaking meets the state legislature's directive. As a result, the Department did not consider alternative methods for achieving the purposes of the rule.<sup>52</sup>

- (e) The probable costs of complying with the proposed rules, including the portion of the total costs that will be borne by identifiable categories of affected parties, such as separate classes of governmental units, businesses, or individuals.**

49. The class of persons that will primarily bear the costs of the proposed rules are providers which seek IDDT certification. The proposed rules will result in one-time, up-front costs to develop and implement an IDDT program in compliance with the proposed rules. The DHS believes that the provider most likely to seek IDDT certification is an outpatient provider which delivers both mental health and chemical dependency treatment services. IDDT certification would likely be consistent with the provider's mission and treatment population.<sup>53</sup>

50. For such a provider, the primary costs would be those for administrative expenses to update treatment policy and procedure manuals, staff training about these policies, staff training on IDDT treatment practices, updates to electronic health records, and data updates to reporting software for transmittal of treatment outcomes to DHS. These costs would likely be incurred over a one-year period and amount to approximately \$20,000. In addition, there would be an up-front certification fee of \$2,000. After the initial startup costs of bringing a program into compliance there would be the ongoing costs of continued compliance. DHS believes that the ongoing program costs would be similar to other treatment services costs as part of doing business as a treatment provider.<sup>54</sup>

- (f) The probable costs or consequences of not adopting the proposed rule, including those costs borne by individual categories of affected parties, such as separate classes of governmental units, businesses, or individuals.**

51. If the rules are not adopted, many of the non-monetary benefits would not be realized. Persons with co-occurring disorders would be less likely to learn about, or have access to, comprehensive dual disorder treatment programs that could address

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<sup>52</sup> *Id.*

<sup>53</sup> Ex. 3 at 6-7 (SONAR).

<sup>54</sup> Ex. 3 at 7 (SONAR).

their needs and benefit these individuals. Without the incentive to fully develop an integrated treatment program that operates consistently with the best practices required in the proposed rule, the traditional, bifurcated systems of care are perpetuated, without positive outcomes for those with co-occurring disorders.<sup>55</sup>

**(g) An assessment of any differences between the proposed rules and existing federal regulation and a specific analysis of the need for and reasonableness of each difference.**

52. The rule DHS proposes governs the certification of integrated dual diagnosis treatment programs. Federal regulations do not govern certification of dual diagnosis treatment. Consequently, there are no differences between the proposed rules and existing federal regulations.<sup>56</sup>

53. The Administrative Law Judge finds that the DHS has met its obligation as to assessing the differences between the proposed rule and federal regulation and the reasonableness of each difference.

**(h) Assessment of the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the rule.**

54. “Cumulative effect” means the incremental impact of the proposed rule in addition to other rules, regardless of what state or federal agency has adopted the other rules. Cumulative effects can result from individually minor but collectively significant rules adopted over a period of time.<sup>57</sup>

55. The proposed rules cover an area that is not addressed by federal law. Consideration of the cumulative effect of federal regulations is therefore not applicable.<sup>58</sup>

56. The standards in the proposed rule are consistent with standards contained in Minnesota statutes including the Minnesota Comprehensive Adult Mental Health Act,<sup>59</sup> and the Minnesota Comprehensive Children’s Mental Health Act.<sup>60</sup> These statutes define the service delivery standards applicable to a comprehensive mental health system and establish within the DHS and state mental health authority.<sup>61</sup>

57. The Standards in the proposed rules are also consistent with the Minnesota laws that address alcohol and other drug dependency and abuse.<sup>62</sup> Those

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<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Minn. Stat. § 14.131.

<sup>58</sup> Ex. 3 at 7 (SONAR).

<sup>59</sup> See, Minn. Stat. §§ 245.461 to 245.486.

<sup>60</sup> See, Minn. Stat. §§ 245.487 to 245.4889.

<sup>61</sup> Ex. 3 at 8 (SONAR).

<sup>62</sup> See, Minn. Stat. ch. 254A.

laws also codify within DHS the state authority over alcohol and other drug dependency and abuse.<sup>63</sup>

58. Establishing standards and practices for certification of programs for persons with co-occurring disorders is wholly consistent with the DHS's role as the state authority for substance use and mental health.<sup>64</sup>

59. Minnesota statutes also contain some requirements that a particular mental health program adopt some elements of integrated treatment services.<sup>65</sup> These requirements are consistent with the integrated services protocol. The proposed rule applies in parity with these requirements.<sup>66</sup>

60. The DHS believes there are no cumulative effects of the proposed rule with other Departmental requirements.<sup>67</sup>

61. The Administrative Law Judge finds the Department has met its obligation as to assessing the cumulative effect of the rule with other federal and state regulations related to the specific purpose of the proposed rule.

## **2. Performance-Based Regulation**

62. The Administrative Procedure Act<sup>68</sup> also requires an agency to describe how it has considered and implemented the legislative policy supporting performance based regulatory systems. A performance based rule is one that emphasizes superior achievement in meeting the agency's regulatory objectives and maximum flexibility for the regulated party and the agency in meeting those goals.<sup>69</sup>

63. The proposed rule will result in better outcomes across a range of societal and health care measures because the rule standards adopt evidence-based practices and prescribe a model of treatment proven to be successful with the target population. In this instance the target population is persons with an acute or chronic mental illness and a substance abuse disorder, who are experiencing problems due to these disorders. Research demonstrates that integrated treatment for these individuals not only improves treatment outcomes for both disorders, but also leads to better housing, employment, education and social outcomes.<sup>70</sup>

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<sup>63</sup> See, Minn. Stat. § 254A.03.

<sup>64</sup> Ex. 3 at 8 (SONAR).

<sup>65</sup> See, e.g., Minn. Stat. § 256B.0623, subd 5(3) (peer support as part of qualified team for adult rehabilitative mental health services); Minn. Stat. § 256B.0947, subd 2(f) (youth mental health assertive community treatment programs required to provide integrated services for dually-diagnosed youth, which includes assertive outreach and stage-wise treatment).

<sup>66</sup> Ex. 3 at 8 (SONAR).

<sup>67</sup> *Id.*

<sup>68</sup> Minn. Stat. § 14.131.

<sup>69</sup> Minn. Stat. § 14.002.

<sup>70</sup> Ex. 3 at 8-9 (SONAR).

64. As certified programs are implemented across the state, the DHS will obtain valuable treatment outcomes data from these programs. DHS will analyze the data to identify patterns and seek to further improve health care outcomes for the individuals served in these programs.

65. The proposed treatment rule is designed to offer maximum flexibility to providers in designing integrated treatment programs and providing integrated services.<sup>71</sup>

### **3. Consultation with the Commissioner of Minnesota Management and Budget (MMB)**

66. As required in Minn. Stat. § 14.131, by letter dated January 28, 2013, the Commissioner of MMB responded to a request by the DHS to evaluate the fiscal impact and benefit of the proposed rules on local units of government. MMB reviewed the Agency's proposed rules and concluded that: "given the voluntary nature of the rule, . . . that the proposed rule will not have significant fiscal impact on local units of government."<sup>72</sup>

67. The Administrative Law Judge finds that the Agency has met the requirements set forth in Minn. Stat. § 14.131 for assessing the impact of the proposed rules, including consideration and implementation of the legislative policy supporting performance-based regulatory systems, and the fiscal impact on units of local government.

### **4. Cost to Small Businesses and Cities under Minn. Stat. § 14.127**

68. Minn. Stat. § 14.127, requires the Agency to "determine if the cost of complying with a proposed rule in the first year after the rule takes effect will exceed \$25,000 for: (1) any one business that has less than 50 full-time employees; or (2) any one statutory or home rule charter city that has less than ten full-time employees." The Agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.<sup>73</sup>

69. The DHS does not believe that the cost of complying with the proposed rule will exceed \$25,000 for any business or any statutory or home rule charter city. It notes that the rule does not impact cities. Additionally, obtaining certification under the rule is voluntary. A small business will only be impacted if it chooses to pursue certification. Finally, the evidence in the record indicates that businesses that do choose to comply with the rule will incur less than \$25,000 in costs during the first year.<sup>74</sup>

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<sup>71</sup> Ex. 3 at 9 (SONAR).

<sup>72</sup> Ex. 10.

<sup>73</sup> Minn. Stat. § 14.127, subds. 1 and 2.

<sup>74</sup> Ex. 3 at 11 (SONAR)

70. The Administrative Law Judge finds that the Agency has made the determinations required by Minn. Stat. § 14.127 and approves those determinations.

## **5. Adoption or Amendment of Local Ordinances**

71. Minn. Stat. § 14.128 mandates that the agency must determine if a local government will be required to adopt or amend an ordinance or other regulation to comply with a proposed agency rule. The agency must make this determination before the close of the hearing record, and the Administrative Law Judge must review the determination and approve or disapprove it.<sup>75</sup>

72. The DHS failed to make a determination whether a local government will be required to adopt or amend an ordinance or other regulation to comply with the proposed rule prior to the close of the hearing record.

73. The Administrative Law Judge finds that the Agency did not fulfill its responsibilities under Minn. Stat. § 14.128.

## **IV. Rulemaking Legal Standards**

74. The Administrative Law Judge must make the following inquiries: Whether the agency has statutory authority to adopt the rule; whether the rule is unconstitutional or otherwise illegal; whether the agency has complied with the rule adoption procedures; whether the proposed rule grants undue discretion to government officials; whether the rule constitutes an undue delegation of authority to another entity; and whether the proposed language meets the definition of a rule.<sup>76</sup>

75. Under Minn. Stat. § 14.14, subd. 2, and Minn. R. 1400.2100, the agency must establish the need for and reasonableness of a proposed rule by an affirmative presentation of facts. In support of a rule, the agency may rely upon materials developed for the hearing record,<sup>77</sup> “legislative facts” (namely, general and well-established principles, that are not related to the specifics of a particular case, but which guide the development of law and policy),<sup>78</sup> and the agency’s interpretation of related statutes.<sup>79</sup>

76. A proposed rule is reasonable if the agency can “explain on what evidence it is relying and how the evidence connects rationally with the agency’s choice of action

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<sup>75</sup> Minn. Stat. § 14.128, subd. 1. Moreover, a determination that the proposed rules require adoption or amendment of an ordinance may modify the effective date of the rule, subject to some exceptions. Minn. Stat. § 14.128, subds. 2 and 3.

<sup>76</sup> See, Minn. R. 1400.2100.

<sup>77</sup> See, *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 240 (Minn. 1984); *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

<sup>78</sup> Compare generally, *United States v. Gould*, 536 F.2d 216, 220 (8th Cir. 1976).

<sup>79</sup> See, *Mammenga v. Agency of Human Services*, 442 N.W.2d 786, 789-92 (Minn. 1989); *Manufactured Housing Institute v. Pettersen*, 347 N.W.2d 238, 244 (Minn. 1984).



to be taken.”<sup>80</sup> By contrast, a proposed rule will be deemed arbitrary and capricious where the agency’s choice is based upon whim, devoid of articulated reasons or “represents its will and not its judgment.”<sup>81</sup>

77. An important corollary to these standards is that when proposing new rules an agency is entitled to make choices between different possible regulatory approaches, so long as the alternative that is selected by the agency is a rational one.<sup>82</sup> Thus, while reasonable minds might differ as to whether one or another particular approach represents “the best alternative,” the agency’s selection will be approved if it is one that a rational person could have made.<sup>83</sup>

78. Because the Agency suggested changes to the proposed rule language after the date it was originally published in the *State Register*, it is also necessary for the Administrative Law Judge to determine if this new language is substantially different from that which was originally proposed. The standards to determine whether any changes to proposed rules create a substantially different rule are found in Minn. Stat. § 14.05, subd. 2. The statute specifies that a modification does not make a proposed rule substantially different if:

“the differences are within the scope of the matter announced . . . in the notice of hearing and are in character with the issues raised in that notice”;

the differences “are a logical outgrowth of the contents of the . . . notice of hearing, and the comments submitted in response to the notice”; and

the notice of hearing “provided fair warning that the outcome of that rulemaking proceeding could be the rule in question.”

79. In reaching a determination regarding whether modifications result in a rule that is substantially different, the Administrative Law Judge is to consider:

whether “persons who will be affected by the rule should have understood that the rulemaking proceeding . . . could affect their interests”;

whether the “subject matter of the rule or issues determined by the rule are different from the subject matter or issues contained in the . . . notice of hearing”; and

whether “the effects of the rule differ from the effects of the proposed rule contained in the . . . notice of hearing.”

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<sup>80</sup> *Manufactured Hous. Inst.*, 347 N.W.2d at 244.

<sup>81</sup> See, *Mammenga*, 442 N.W.2d at 789; *St. Paul Area Chamber of Commerce v. Minn. Pub. Serv. Comm’n*, 312 Minn. 250, 260-61, 251 N.W.2d 350, 357-58 (1977).

<sup>82</sup> *Peterson v. Minn. Dep’t of Labor & Indus.*, 591 N.W.2d 76, 78 (Minn. App. 1999).

<sup>83</sup> *Minnesota Chamber of Commerce v. Minnesota Pollution Control Agency*, 469 N.W.2d 100, 103 (Minn. App. 1991).

## **V. Analysis of the Proposed Rule**

80. Most sections of the proposed rules were not opposed by any member of the public and were adequately supported by the SONAR. Accordingly, this Report will not necessarily address each comment or rule part. Rather, the discussion that follows below focuses on those portions of the proposed rules as to which commentators prompted a genuine dispute as to the reasonableness of the Agency's regulatory choice or otherwise requires closer examination.

81. The Administrative Law Judge finds that the Agency has demonstrated by an affirmative presentation of facts the need for and reasonableness of all rule provisions that are not specifically addressed in this Report.

82. Further, the Administrative Law Judge finds that all provisions that are not specifically addressed in this Report are authorized by statute and that there are no other defects that would bar the adoption of those rules.

### **Overview**

83. While some disagreed with certain provisions, there was overwhelming support for the intent and purpose of the proposed rule.<sup>84</sup>

84. Several stakeholders complained that the proposed rule lacks a clear payment method to compensate a provider.<sup>85</sup>

85. The DHS responded that the proposed rule is a licensing regulation that will be used to certify integrated dual diagnosis treatment providers. It is not a payment rule designed to set reimbursement methods or fee schedules.<sup>86</sup>

### **Additional Actions Urged By Stakeholders and DHS Modifications**

86. The majority of the comments addressed specific provisions of the rule. The DHS considered them all and adopted the changes listed below. The DHS rejected some of the proposed revisions to the rule. In each instance, the DHS's rational in declining to make the proposed change was well grounded in the record and was reasonable.

87. The DHS, consistent with input received from stakeholders, intends to make the following changes to the rule as approved by the Revisor's Office on November 29, 2012:

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<sup>84</sup> See, Test. of K. Eden ("supports the rule's intent and philosophy"), Test. of P. DeSanta ("supports intent of the rule"), Test. of J. Henderlite (part of the strengths of the proposal are the "philosophy and intent of the rule"); and Comments of Kia Cashman (April 23, 2013) ("I begin by expressing support for the goal of improving service quality ensuring consistency among like services as well as following best and evidence-based practices.")

<sup>85</sup> See, Test. of K. Eden; Test. of R. Brand; and Test. of J. Henderlite.

<sup>86</sup> See, DHS Rebuttal (April 30, 2013).

88. Minn. R. 9533.0010, subp. 2, should be revised to read:

**Subp. 2 ~~Certification Option.~~ Optional Certification.** A program that provides integrated dual diagnosis treatment, dual disorder treatment, co-occurring capable treatment, or other forms of treatment designed to address co-occurring mental illness and substance-related disorders in adults or children is not required to obtain an integrated dual diagnosis treatment certification.

89. Minn. R. 9533.0010, subp. 3 should be revised to read:

**Subp. 3 ~~Requirements supercede~~ Substitution of requirements.** A certificate holder must substitute the requirements of parts of chapter 9533 for requirements in other department rules in accordance with part 9533.0900, subpart 1, and part 9533.0100, subpart 2. A certificate holder that is also licensed as a chemical dependency program in accordance with Minnesota Statutes, chapter 245A, and part 9530.6415 must substitute the requirements of parts 9533.0010 to 9533.0140 supersede the requirements of other department rules, except where other applicable rules establish a more stringent standard for the requirements in part 9530.6495.

90. Minn. R. 9533.0020, subp. 3 should be revised to read:

**Subp. 3 Care Coordination.**

A. "Care coordination," for an adult, means helping the client obtain the services and supports needed by the client, ensuring coordination and consistency of care across these services and supports, ensuring ongoing evaluation of treatment progress and client needs to establish a lifestyle free from harmful effects of substance use ~~abuse~~ and oriented toward ongoing recovery from co-occurring substance-related disorder and mental illness. Examples of services and supports include medical, social, educational, and vocational services. For the purposes of this rule, the phrase "care coordination" is interchangeable with the phrases "service coordination" and "case management."

B. "Care coordination," for a child, means a community intervention to ensure the consistency of care and coordination of services and supports across the child's medical, social service, school, probation, and other services, oriented toward aiding the child in refraining from substance use and ongoing recovery from mental disorders. For the purposes of this rule, the phrase "care coordination" is interchangeable with the phrases "service coordination" and "case management."

91. Minn. R. 9533.0020, subp. 8, should be revised to read:

Subp.8 **Chemical Dependency.** “Chemical dependency” means a ~~substance-related~~ substance use disorder.

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Subp. 39. **~~Substance-related use disorder.~~** ~~Substance-related Substance use~~ disorder means a pattern of substance use as defined in the Diagnostic and Statistical Manual of Mental Disorders -~~V~~ IV-TR(DSM), ~~et seq.~~ The section of the DSM-V that defines ~~substance-related substance use~~ disorder is incorporated by reference. The current DSM was published by the American Psychiatric Association in 2013, ~~1994~~ in ~~Washington D.C.~~ It is not subject to frequent change. The DSM is available through the Minitex interlibrary loan system.

92. Minn. R. 9533.0020, subp. 11, should be revised to read:

Subp.~~10~~ **Client.** “Client” means an individual accepted by a certified dual diagnosis treatment program for assessment or treatment of co-occurring disorders. An individual remains a client until the program no longer provides or plans to provide ~~the individual with~~ integrated dual diagnosis treatment services to that client

93. Minn. R. 9533.0020, subp. 25, should be revised to read:

Subp. 25. **Integrated dual diagnosis treatment.** Integrated dual diagnosis treatment means the integration of ~~delivery systems~~ documented clinical services, and treatment for substance-related disorders and mental illness to produce better outcomes for dually diagnosis clients ~~that is documented.~~ It includes changes treatment coordination, organizational policy and treatment practice ~~and coordination~~ within an entire agency to help practitioners provide integrated treatment. ~~The overall vision of an integrated system is to effectively service individual with co-occurring disorders no matter where they enter the system.~~

94. Minn. R. 9533.0020, subp. 30, should be revised to read:

Subp. 30. **Psychoeducation.** “Psychoeducation” means individual, family, or group services designed to educate and support the individual and family in understanding symptoms, treatment components, and skill development; preventing relapse ~~and the acquisition of comorbid disorders;~~ and achieving optimal mental health and chemical health and long-term resilience.

95. Minn. R. 95533.0020, subp. 33, should be revised to read:

Subp. 33. **Recovery Philosophy.** “Recovery philosophy” means a philosophical framework for organizing health and human service systems that affirm hope for recovery, ~~exemplifies a strength based orientation, and offers a wide spectrum of services and supports aimed at promoting resilience and long term recovery from co-occurring disorders~~ successful treatment and ongoing long-term treatment success, and includes a significant reduction in acute and chronic symptoms, a focus on client strengths, and the availability of a wide spectrum of services and supports that promote resilience and reduce the risk of relapse and its harmful effects.

96. Minn. R. 9533.0020, subp. 40, should be revised to read:

**Subp. 40. Telehealth.** ~~“Telehealth” means the exchange of medical information from one site to another via electronic communications for use to improve a client’s health status. An example is videoconferencing. Telehealth does not include electronic mail or telephone text transmission.~~  
**Telemedicine.** For mental health services and substance-related disorder integrated dual diagnosis services, telemedicine has the meaning given to the phrase “mental health telemedicine” in Minnesota Statutes, section 256B.0625, subdivision 46 when telemedicine is used to provide integrated dual diagnosis treatment.

97. Minn. R. 9533.0110, should be revised to read:

#### **9533.0110 Staffing Requirements**

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##### **Subp. 2. Staffing**

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C. Team member may provide integrated dual diagnosis services through telemedicine ~~telehealth~~.

98. Minn. R. 9533.0040 should be revised to read:

#### **9533.0040. Target Population.**

~~The certificate holder must design its program to be capable of furnishing services to the relatively intense needs of the target population, although the certificate holder may elect to serve a broader spectrum of clients in its program. The target population is persons~~ individuals experiencing problems with a substance-related disorder and mental illness whose acute or chronic symptoms would be best served through integrated dual diagnosis treatment ~~services~~. The certificate holder must

design its program to be capable of furnishing providing integrated dual diagnosis treatment to for the relatively intense needs of the target population, the certificate holder may elect to serve a broader spectrum continuum of clients in its program treat a broader continuum of individuals in its program.

99. Minn. R. 9533.0060, subp. 1, should be revised to read:

Subp. 1. **Program structure.** The certificate holder must:

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B. establish an integrated dual diagnosis treatment organizational structure, which reflects the practice principals defined in subpart 2 and supports the provision of services according to parts 9533.0070 to 9533.170 that to facilitates the integration of substance-related disorder and mental health clinical treatment services; and

C. provide integrated dual diagnosis services through a multidisciplinary team according to part 9533.0110; and

~~D. use a billing structure that is amenable to reimbursement of integrated dual diagnosis treatment, if funding becomes available.~~

100. Minn. R. 9533.0060, subp. 2, should be revised to read

Subp. 2. **Practice Principals.**

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N. recognize and ~~remain sensitive~~ respond to issues related to culture, ~~ethnic diversity, ethnicity, race, acculturation, and historical trauma~~ and recognize the client's cultural beliefs and values through culturally-responsive, trauma-informed services.

101. Minn. R. 9533.0090, subp. 1, should be revised to read:

Subp. 1. **Integrated assessment required.** When the certificate holder has made a preliminary determination that the client has a co-occurring substance-related disorder and mental illness, the certificate holder must complete an integrated assessment that includes all of the information required in subparts 3 to 5 and parts 9505.0372, subpart 1, and 9539.6422, subpart 1. The certificate holder must substitute the requirements of this part for the requirements in parts 9505.0372, subpart 1, 9520.0790, subpart 3, 9530.6422, subpart 1 and 2960.0450, subpart 2, item A, as applicable, for a client who is receiving integrated dual diagnosis treatment.

102. The DHS proposed to modify part 9533.0090 by adding a new subpart 2, and renumbering the remaining parts accordingly. Minn. R. 9533.0090, subp. 2, should read as follows:

Subp. 2. Notwithstanding the requirement in subpart 1, if the certificate holder has performed a diagnostic assessment for the purpose of complying with part 9533.0080, then the certificate holder does not need to comply a second time with the requirements in part 9533.0372, subpart 1, as part of the integrated assessment.

103. Minn. R. 9533.0100, subps. 1 and 2, should be revised to read:

**Subpart 1. Integrated treatment plan required.** The certificate holder must:

- A. adopt a protocol that requires completion of an integrated treatment plan:
  - (1) in residential programs, no more than 14 days after the integrated assessment is completed; and
  - (2) in outpatient programs, no more than 30 days after the integrated assessment is completed;
- B. prepare the client's integrated treatment plan by integrating information obtained during the process described in parts 9533.0080 and 9533.0090 into a set of actions to be taken by the treatment team; and
- C. adopt a protocol that requires review of and updates to the integrated treatment plan to reflect the client's individual needs relevant to the client's state of change and stage of treatment based on client progress and response to treatment:

- (1) in residential programs, every 14 days; or
- (2) in outpatient programs, every 30 days.

**Subp. 2. Substitution of requirements.** The certificate holder must substitute the requirements of this part for the requirements in parts 9505.0371, subpart 7, item C, 9529.0790, subpart 4, 9530.6425, subparts 1 and 2, subpart 3, item B, and subpart 3a, and 2960.0490, subparts 1, 2, 2a, 3 and 5, as applicable, for a client who is receiving integrated dual diagnosis treatment.

104. Minn. R. 9533.0120, subp. 4 (E), should be revised to read:

**Subp. 4. Integrated case consultation.** The certificate holder must perform integrated case consultation for collaborative review of the client's

progress and response to treatment. During the integrated case consultation, the certificate holder must:

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E. update integrated treatment plan in accordance with part 9533.0100;  
~~based on client progress and response to treatment:~~

(1) ~~in residential programs, every 14 days; or~~

(2) ~~In outpatient programs, every 30 days;~~

105. Minn. R. 9533.0130, subp. 3, should be revised to read:

Subp. 3. **Motivational interviewing.** The certificate holder must:

A. ~~Adopt and routinely use a protocol for assessment of treatment stage and motivation for change;~~

B. ~~Use a tool approved by the commissioner to assess motivation for change; and~~

C. ~~use motivational interviewing to help the client recognize how the client's substance related disorder and mental illness symptoms interfere with the client's ability to achieve personally valued goals, and become motivated to work on symptom management to pursue these goals.~~

106. Minn. R. 9533.0130, subp. 5, should be revised to read:

Subp. 5. **Evidence-based procedures for delivering treatment.** The certificate holder must ~~offer~~ use evidence-based procedures for delivering treatment that includes the procedures in items A and B, which may include cognitive behavioral approaches, techniques, or strategies that address the interaction of the co-occurring disorders.

A. When clinically indicated for the client in the judgment of the clinician, the certificate holder must use motivational interviewing:

(1) to help the client recognize how the client's substance use disorder and mental illness symptoms interfere with the client's ability to achieve personally-valued goals; and

(2) To become motivated to work on symptoms management to pursue these personally-valued goals.

B. When clinically indicated for the client in the judgment of the treatment team, other permissible evidence-based practices include



cognitive-behavioral approaches and other practices supported by the professional literature and appropriate for the client's recovery.

107. Minn. R. 9533.0130, subp. 7 and Minn. R. 9533.0140, subp. 2, should be revised to read:

Subp. 7. **Psychoeducation.** The certificate holder must offer Psychoeducation about the possible interactions between mental health disorders and substance use disorders, including how the disorders may worsen one another to:

A. The client. Psychoeducation must also include information about the specific disorders experienced by the client, including ~~about mental health and substance use disorders, including treatment information, and the characteristics, features, and the~~ interactive course of the both types of disorders; and

B. The client's family.

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#### Part 9533.0140 **Ancillary Services**

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~~Subp. 2. **Family psychoeducation.** The certificate holder must provide family Psychoeducation that includes education about the possible interaction between mental health disorders and substance use disorders, including how the disorders may worsen one another.~~

108. Minn. R. 9533.0140, subps. 2, 8 and 11 should be revised to read:

Subp. 2. **Stage-based Individual and group modalities** ~~counseling.~~

A. The certificate holder must adopt and routinely use a protocol to assess and re-assess stage of treatment and stage of change.

B. The certificate holder must offer individual and groups modalities ~~counseling~~ that considers the client's stage of treatment ~~change orientation~~ to help the client:

1. Identify and address problems related to substance use disorders, mental health disorders, and the interaction between them;
2. Develop strategies to avoid inappropriate substance use; and

3. Maintain mental health gains and stability after discharge.

C. Treatment delivered in a group modality must provide each individual in the group with stage-appropriate treatment, and must include:

1. a same-stage or mixed-stage treatment group; and
2. a social skills training group.

~~Subp. 8. **Dual disorder groups.** The certificate holder must offer dual disorder groups that meet the client's needs based on the client's stage of treatment including:~~

- ~~A. a stage based treatment group; and~~
- ~~B. a social skills training group.~~

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Subp. 11. **Psychopharmacological treatment.** The certificate holder must offer psychopharmacological treatment and adopt a protocol that states the prescribing provider must collaborate with the clinical team to:

~~\*\*\*\*~~

~~C. consider prescribing~~ prescribe and manage medication used in the treatment of substance use disorders.

109. Minn. R. 9533.0050, subp. 4, should be revised to read:

Subp. 4. **Illness management and recovery principals.** The certificate holder must describe in its policies and procedures how principles of illness management and recovery will be infused throughout integrated dual diagnosis treatment.

110. The DHS states that these changes do not result in substantially different rule, and are being made to comply with federal and state law or are supported by the views submitted to the Agency.

111. The DHS's action in revising the text is needed and reasonable and would not be a substantial change from the rule as originally proposed.

### **Recommended Determination of the Administrative Law Judge regarding the Proposed Rule**

112. The proposed rule introduces a voluntary process to certify IDDT programs that incorporate evidence based practices. It is inevitable that there will be disagreement between people about how to structure and implement such a rule.

Reasonable minds may differ. However, as noted above, the DHS is legally entitled to make choices between possible approaches as long as its choice is rational. It is not the role of the Administrative Law Judge to determine which policy is “best” or to substitute his judgment for that of the DHS, for that would invade the policy making discretion of the DHS. The question is whether the choice made by the Department is one that a rational person could have made.<sup>87</sup>

113. The Administrative Law Judge concludes the DHS has shown there is a rational basis for the proposed rule. In compliance with Minnesota Law the DHS considered the advice of members of the public, businesses, and other organizations. As described in the SONAR, the DHS engaged in an extensive review process. The process afforded significant opportunities for input from members of the public, organizations, businesses and others.

114. The DHS’s SONAR and post-hearing submission provide an adequate explanation of the need for and reasonableness of the proposed rule, and the rule falls within the broad authority the legislature has given to the DHS to create the proposed rule. The Administrative Law Judge concludes that in accordance with applicable case law,<sup>88</sup> the DHS has provided ample explanation of the facts on which it is relying and how those facts connect rationally with the approach it has taken in creating the proposed rule.

115. Accordingly, the Administrative Law Judge finds that the DHS has demonstrated that the proposed rule is needed and reasonable, and there are no other problems that preclude their adoption and no defects are found in the rule as proposed.

Based upon the Findings of Fact and the contents of the rulemaking record, the Administrative Law Judge makes the following:

### **CONCLUSIONS OF LAW**

1. The Minnesota Department of Human Services gave notice to interested persons in this matter.

2. Except as noted in Finding 74, the Agency has fulfilled the procedural requirements of Minn. Stat. § 14.14 and all other procedural requirements of law or rule.

3. As to Finding 74, the Administrative Law Judge notes that the certification process is voluntary and that in the context of addressing the costs of the proposed rules to small business and cities under Minn. Stat. § 14.127, the DHS determined “The rule does not impact cities.”<sup>89</sup> Logically, if the rule is voluntary and “does not impact cities” no local government will need to adopt or amend an ordinance or other regulation

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<sup>87</sup> *Federal Sec. Adm’r v. Quaker Oat Co.*, 318 U.S. 218, 233 (1943).

<sup>88</sup> *Manufactured Hous. Inst. V. Pettersen*, 347 N.W.2d 238, 244 (1984).

<sup>89</sup> See, Ex. 3 at 11 (SONAR).

to comply with the proposed rules. The Administrative Law Judge concludes that the cited omission is a harmless error under Minn. Stat. § 14.15, subd. 5.

4. The Administrative Law Judge concludes that the Agency has fulfilled its additional notice requirements.

5. The Agency has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1; 14.15, subd. 3; and 14.50 (i) and (ii).

6. The Notice of Hearing, the proposed rules and Statement of Need and Reasonableness (SONAR) complied with Minn. R. 1400.2080, subp. 5.

7. The Agency has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14 and 14.50.

8. The modification to the proposed rules suggested by the Agency after publication of the proposed rules in the State Register are not substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.05, subd. 2, and 14.15, subd. 3.

9. As part of the public comment process, a number of stakeholders urged the Agency to adopt other revisions to Part 9533. In each instance, the Agency's rationale in declining to make the requested revisions to its rules was well grounded in this record and reasonable.

10. A Finding or Conclusion of need and reasonableness with regard to any particular rule subsection does not preclude and should not discourage the Agency from further modification of the proposed rules based upon this Report and an examination of the public comments, provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

### **RECOMMENDATION**

IT IS HEREBY RECOMMENDED that the proposed rules be adopted.

Dated: June 4, 2013

s/James E. LaFave  
\_\_\_\_\_  
JAMES E. LAFAVE  
Administrative Law Judge

Reported: Digitally Recorded.

## **NOTICE**

This Report must be available for review to all affected individuals upon request for at least five working days before the agency takes any further action on the rules. The agency may then adopt the final rules or modify or withdraw its proposed rule. If the agency makes any changes in the rule, it must submit the rule to the Chief Administrative Law Judge for a review of the changes prior to final adoption. Upon adoption of a final rule, the agency must submit a copy of the Order Adopting Rules to the Chief Administrative Law Judge. After the rule's adoption, the OAH will file certified copies of the rules with the Secretary of State. At that time, the agency must give notice to all persons who requested to be informed when the rule is adopted and filed with the Secretary of State.